IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK—APPELLATE DIVISION—THIRD DEPARTMENT.

MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PETER H. SCHIFF
General Counsel

HOWARD J. READ
Attorney

Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

Attorneys for Appellee,
Public Service Commission
of the State of New York

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MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the grounds that it does not present a substantial federal question, and that the federal question was not timely or properly raised or expressly passed upon. Furthermore, there is no warrant for granting the alternative request for a writ of certiorari.

Statement

On November 16, 1976, appellee, the Public Service Commission of the State of New York (Commission), concluded an investigation of a petition by appellant, Niagara Mohawk Power Corporation (Niagara Mohawk or company), for increased rates. The Commission granted the request in part, but when determining the company's revenue requirement excluded from rate base approximately $12.5 million received as Federal income tax refunds (Appellee's appendix, p. 1a). The refunds resulted from Niagara Mohawk's retroactive application of guideline lives (a form of accelerated depreciation) which decreased the company's income tax liability for 1966-1968 tax years. The company had not filed for the refunds until 1973 and 1974 and did not receive the refunds until 1975 and 1976. The Commission's rate determination was the first complete rate case after all of the tax refunds had been received by Niagara Mohawk.

The company sought review of the Commission's decision in a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. The case, which was commenced in Supreme Court, Albany County, was transferred to the Appellate Division, Third Department (Appellant's appendix, pp. 11a-12a), which concluded that the Commission's determination was proper. The Court stated (*Niagara Mohawk Power Corp. v. Public Service Commission*, 59 A.D.2d 73, 75):

> . . .[T]he overall conclusion of the respondent that the recovery of items considered to be an expense in computing revenues or tariffs constitutes capital contributed by consumers is not lacking a rational basis. While the concept that it is a return of expenses actually paid by consumers is not persuasive, the notion that the money represents items intended by both parties to have been paid dollar for dollar by consumers and not from the ordinary employment of investment funds reasonably flows from the respondent's decisions.

Subsequently, the Appellate Division denied Niagara Mohawk's motion for reargument or its alternative request for permission to appeal to the New York Court of Appeals (Appellant's appendix, pp. 2a-3a). After that denial, Niagara Mohawk moved the Court of Appeals for leave to appeal. That motion was also denied (Appellant's appendix, p. 1a).

Appellant's pleadings before both the Appellate Division (Appellee's appendix, pp. 2a-4a) and the Court of Appeals (Appellee's appendix, pp. 5a-7a) show that at no time during its appeal in the proceeding did Niagara Mohawk pursue the question of whether the Commission's orders violated provisions of the Constitution.

Appellant filed a notice of appeal to this Court on April 4, 1978 (Appellant's appendix, pp. 13a-14a).

ARGUMENT

I. There is no substantial federal question.

This appeal is taken pursuant to 28 U.S.C. 1257(2) (Appellant's appendix, p. 14a), which provides for appeals to this Court from state court decisions ". . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." The statute in question is a rate order of the Commission. If an appeal is not granted, appellant asks that its request be acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. 2103 (Jurisdictional Statement, p. 3).

The Court should not entertain this case, however, because it presents no substantial federal question for review. The claims are flimsy, to say the least. In addition, as we discuss in Point II below, appellant did not properly raise its asserted federal constitutional argument in the New York State courts.

The state statute whose constitutionality is being challenged by appellant (Jurisdictional Statement, pp. 6-8) is a rate order of the Commission which determined that approximately $12.5 million of Niagara Mohawk's rate base did not require a return on investment when the Commission set just and reasonable rates for the company in a decision dated November 16, 1976. The rate base exclusion related to what the Commission found to be (Appellee's appendix, p. 1a) customer-contributed capital in the form of income tax refunds resulting from a recomputation of the company's federal income taxes for the years 1966-1968. Niagara Mohawk had timely paid its income taxes during the years 1966-1968 and its rates were based on the payment of such taxes. After the Commission in 1972 had indicated that New York utilities should use guideline lives—a form of accelerated tax depreciation—(*Consolidated Edison Company of New York, Inc.*, 12 NY PSC 630 (1972)), Niagara Mohawk in 1973 and 1974 requested refunds for prior years. In effect, the company seeks to have the benefit both of rates based on higher taxes and the use of refunds stemming from a post-rate year recomputation of taxes. The company challenges the Commission's rate treatment of the tax refunds as being confiscatory and in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

Contrary to appellant's argument, a utility is not constitutionally entitled even to retain such refunds. Although the Commission, here, did not order a return of the refunds to the company's ratepayers, but rather excluded the refunds from the rate base earning a return, it clearly had the authority to take necessary measures to protect the ratepayers whose past rates had paid for expenses that were later refunded.

While there is no constitutional prohibition to reparations or retroactive ratemaking, neither the New York Public Service Law nor the similar provisions of the Natural Gas Act contemplate such orders. And that is not even involved here. This Court, for example, approved the flow through of refunds resulting from the judicial stay of an FPC rate reduction order as not involving reparations or past ratemaking in *F.P.C. v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949). In that case, the Federal Power Commission had ordered a reduction in wholesale natural gas rates. Both the pipeline companies who were supplied by Interstate and local distribution companies supplied by the pipeline companies claimed entitlement to refunds resulting from a fund established pending judicial review of the FPC's rate reduction order. Even though the fund had been created through payments by the pipeline companies, this Court directed that the refund be paid to the customers of the pipelines.

Other orders of the FPC directing the flow through of refunds have also been upheld by the federal courts. *See, Texas Eastern Transmission Co.*, 39 F.P.C. 630 (1968), affirmed *sub nom Texas Eastern Transmission Co. v. F.P.C.*, 414 F.2d 344, 349 (5th Cir., 1969), certiorari denied, 398 U.S. 928 (1970); *Northern Natural Gas Co. v. F.P.C.*, 215 F.2d 892, 898 (8th Cir., 1954).

Here, although the Commission did not order a refund because it determined that the company's cash flow situation made it desirable for it to retain the money, it found that the customers should not be required to pay a return on the refunds retained. Niagara Mohawk had paid taxes and based its rates in the earlier years upon its understanding and interpretation of applicable laws existing at the time the returns were filed. The nature of the income tax process is such, that in some cases, adjustments either for excesses or deficiencies may take years to determine. The Commission, of course, in the meantime allows the company to recover its tax expense in

rates it approves. If the company overpays its taxes the rates approved will have allowed the company to recover an expense which is later refunded. At that time, the Commission must take action to protect the ratepayers from bearing the burden of the overpayment. If, on the other hand, the company is charged with a deficiency in past payments, the Commission will permit a company to recover tax deficiencies later assessed in a current rate case.

This case is totally unlike *Board of Pub. Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), cited by appellant (Jurisdictional Statement, pp. 7-8), where the New Jersey Commission sought to offset a rate increase by applying a past excess in the company's depreciation reserve to future increased expenses. Here the Commission has not sought to use a past excess in earnings to reduce future rates, but has, rather, denied the company's request for a return on money it received as a rebate of expenses previously paid. There can be no confiscation in this case because Niagara Mohawk had been allowed the full expense for taxes it incurred and it will therefore not be deprived of an opportunity to earn a reasonable rate of return (*F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)). There is plainly no obligation to permit a utility *two* chances to earn the same expenses.

As in *Interstate, supra,* no claim has been made that Niagara Mohawk's rates were so low during the period 1966-1968 that it is entitled as a matter of law to the refunds. To the contrary, the company's rates were set not taking into account the availability of guideline lives to reduce income taxes, so the company was actually provided with more money than was required to earn a reasonable rate of return.

Niagara Mohawk also argues (Jurisdictional Statement, pp. 8-9) that its right to due process of law was violated because the Appellate Division of the Supreme Court confirmed the Commission's order on the basis of a rationale not used by the

Commission. This contention is not correct and, in any event, does not raise any constitutional issues.

After reviewing the Commission's order, the Appellate Division stated (59 A.D.2d at 75):

> Based upon the foregoing considerations, the overall conclusion of the respondent that the recovery of items considered to be an expense in computing revenues or tariffs constitutes capital contributed by consumers is not lacking a rational basis....

The Commission's conclusion that the tax refunds constituted consumer contributed capital was the basis of the Commission's determination to exclude these sums from rate base (Appellee's appendix, p. 1a). The result of the Commission's opinion was to treat Niagara Mohawk's tax refunds as it would have treated any other customer contributed capital and that is precisely the result which the Appellate Division accepted and which the company challenges in this proceeding. Moreover, the Commission's rationale, like that of the Appellate Division, was based on the fact that Niagara Mohawk's rates in 1966-1968 had assumed an obligation to pay taxes without regard to guideline lives. Once refunds were received because of a recomputation of taxes based on guideline life use, that assumption turned out to be invalid.

The Appellate Division properly exercised its responsibility under New York Law. The Appellate Division's decision is in keeping with its responsibilities under New York Law, Civil Practice Law and Rules, § 7803, which provides that the court in reviewing a Commission decision should assess "...whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..." Moreover, appellant was not even able to convince the New York Court of Appeals that the Appellate Division's decision merited review by that Court. In any event, the responsibility of reviewing

courts in New York State is not a matter that raises federal Constitutional issues permitting appeal to this Court or warranting consideration on certiorari.

S.E.C. v. Chenery Corp., 332 U.S. 194 (1947), cited by appellant (Jurisdictional Statement pp. 9-10), would not, contrary to appellant's contention, raise issues of a constitutional nature, even if it were factually in point. *Chenery* essentially held that a federal administrative agency must be correct for the right reasons, otherwise a remand is required. While we believe that situation obtained in the affirmance of the Commission's action in the State courts, *Chenery* is concerned with the proper scope of a federal court reviewing federal agency decisions, and as the quote cited by appellant shows (Jurisdictional Statement, p. 9), was based on construing Congressional intent in defining the scope of review. It formulates a doctrine of judicial restraint setting forth the limits of a court's responsibilities when reviewing an agency's decision. On the other hand, as this Court's decision in an earlier *Chenery* case, *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943), makes clear, the authority of a federal appellate court would permit sustaining a lower court decision on different grounds. Appellant's attempt (Jurisdictional Statement, p. 9) to link the *Chenery* doctrine with due process considerations, by arguing that procedural due process requires the opportunity to challenge the evidence and the theory that purportedly supports an agency's determination, totally ignores that long standing practice. While the role of a federal reviewing court differs depending on whether a case comes from an agency or lower court, due process considerations are not involved. Even assuming, *arguendo*, the New York State courts did not construe their review function in the same way, there is no reason why they would be precluded, as a constitutional matter, from modifying an administrative decision.

II. The alleged federal question raised by the appellant in its jurisdictional statement may not be raised for the first time in this Court.

This Court will not exercise jurisdiction to consider federal questions presented for the first time in a jurisdictional statement pursuant to 28 U.S.C. 1257(2), *Cardinale v. Louisiana*, 394 U.S. 437 (1959); *Safeway Stores, Inc. v. Oklahoma Retail Grocers*, 360 U.S. 334 at 342 n.7 (1969); *Herndon v. Georgia*, 295 U.S. 441 (1935); and *Crowell v. Randell*, 10 Pet. 368 (1836). This rule or practice provides sufficient basis for dismissing appellant's claim (whether treated as an appeal, or a petition for certiorari pursuant to 28 U.S.C. 2103). In its pleadings before the New York State courts in this case, appellant has failed in its obligation to "...specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them...; and the way in which they were passed upon by the court..." Supreme Court Rules 15(1)(d) and 23(1)(f).

Neither Niagara Mohawk's petition to the Appellate Division of the New York Supreme Court, Third Department, (Appellee's appendix, pp. 2a-4a) nor its Motion for Leave to Appeal to the New York Court of Appeals (Appellee's appendix, pp. 5a-7a), includes any reference to the United States Constitution. In short, the federal question asserted here was never "raised, preserved, or passed upon in the state courts below", *Cardinale v. Louisiana, supra,* at 438-439.

The burden of establishing that a federal question was raised properly in the state courts rests clearly on appellant. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942) and *Street v. New York*, 394 U.S. 576 (1969). Appellant has failed to meet that burden by simply asserting (Jurisdictional Statement, pp. 2-3) that the validity of the challenged rate orders "...was drawn into question in the Appellate Division

on the ground of their being repugnant to the Constitution of the United States...." In fact, the petition (Appellee's appendix, pp. 2a-4a) nowhere mentions the Fifth Amendment, the Fourteenth Amendment or even the Constitution. Paragraph 7 of the petition, which sets forth the grounds for appellate review of administrative orders pursuant to Article 78 of the New York Civil Practice Law and Rules, includes the word "confiscatory"; however, the mere insertion of that word in a paragraph summarizing the grounds for judicial review does not sufficiently raise and preserve the constitutional question. Moreover, a reading of the briefs and the Appellate Division order affirming the respondent's rate order discloses that at no time was a federal question raised, argued, or decided.

The thrust of appellant's arguments in the state court's concerned the authority of the Commission under the New York Public Service Law. That statute contains a provision (Section 66 (18)) empowering the Commission to order refunds to appellant's customers when the FPC reduces wholesale gas or electric rates. Appellant has never questioned the constitutionality of the statute, but did argue, when the Commission ordered a flow through to the ratepayers of income tax refunds, that the specific delegation of power in Section 66 (18) of Public Service Law showed that the Commission lacked statutory authority to order the flow through of other refunds. *See, Niagara Mohawk Power Corp. v. Public Service Commission*, 54 A.D.2d 255 (1976).

Even more damaging to the appellant's position is the substance of its notice of motion for leave to appeal to the Court of Appeals and the papers filed in support thereof (Appellee's appendix, pp. 5a-7a). Nowhere in those papers did appellant raise any federal question. In those papers, appellant urged simply that the Court of Appeals decide several rate-making issues on state law grounds which the court declined to do. By raising a federal question for the first time in its jurisdictional statement, appellant would, in effect, deprive the New York Court of Appeals of the opportunity to pass on the federal question in the first instance—an opportunity which this Court has always insisted be given as a prerequisite to exercising its jurisdiction whether by certiorari or appeal. *See, e.g., Hill v. California*, 401 U.S. 797, 805 (1971), where the Court asserted that there is "...the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes...", citing *Cardinale, supra, see also, Crowell v. Randell, supra.**

In addition to appellant's failure to raise a substantial federal constitutional question for review by this Court, its failure to raise the issue below precludes its attempt to raise the issue *de novo* at this time.

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* Appellant's failure to raise a federal constitutional question below is further demonstrated by its decision to move for leave to appeal to the Court of Appeals pursuant to New York CPLR § 5602 rather than attempt to take an appeal as of right as provided by CPLR § 5601(b) where "...there is directly involved the construction of the constitution of the state or the United States...".

While not showing a right to appeal, appellant's Jurisdictional Statement shows no reason why this Court should grant a writ of certiorari. There are clearly no federal questions presented that warrant review by this Court.

Conclusion

For the above reasons, appellant's appeal should be dismissed and this Court should not grant a writ of certiorari to review the decision below.

Respectfully submitted,

PETER H. SCHIFF
General Counsel
HOWARD J. READ
Attorney
Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

Attorneys for Appellee
Public Service Commission
of the State of New York

May , 1978

APPENDIX

Commission Opinion Denying Niagara Mohawk A Return On Tax Refunds

* * *

Tax Refunds

In September 1975 the Commission ordered NMP to flow through to its ratepayers tax refunds it received from the retroactive application of minimum guideline lives for computing tax depreciation. The amount to be passed on is approximately $12.4 million. NMP contested the Commission's order and prevailed in the Supreme Court.

On November 10, 1976, the Appellate Division issued its opinion (*Niagara Mohawk Power Corp. v. PSC,* Case 29296). While this court also held that the Commission erred in ordering refunds between cases, it specifically stated that this conclusion was not unfair because the Commission may consider "this acquired money when a future rate adjustment is requested." While we do not agree with the court's decision that our original remedy was incorrect, the fact that a rate case is now underway provides an immediate vehicle for considering the proper treatment of these refunds.[1]

The Appellate Division's decision does not appear to prohibit any particular method of dealing with this money. The company's cash flow considerations, however, to which we refer throughout this Opinion, argue persuasively against ordering the company to pay out these sums at this time. But this money was originally paid by customers for an expense that the company ultimately did not incur. Accordingly, we will require the amounts to be treated as customer-contributed capital with a zero cost. The treatment will give consumers the full benefit of the refunds.[2]

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[1] Since the timing of the court's decision enables us to deal fully with the funds in question now, the issue in court is moot insofar as that case is concerned.

[2] We reserve the right, however, to provide for a different distribution of these funds in our next rate case if circumstances at that time would indicate the desirability of such a change.

Petition

SUPREME COURT OF THE STATE
OF NEW YORK

County of Albany

In the Matter of the Application of
NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

THE PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Respondent.

Index No. .....

To the Supreme Court of the State of New York:

The petition of Niagara Mohawk Power Corporation ("Niagara Mohawk" or the "Company") respectfully shows:

1. Petitioner, Niagara Mohawk Power Corporation, is a privately owned public utility corporation serving customers in 37 counties of the State of New York with gas and electricity or with electricity only; Niagara Mohawk is duly incorporated under the laws of the State of New York with its principal office located at 300 Erie Boulevard West, Syracuse, New York 13202; Niagara Mohawk is subject to the jurisdiction of the Public Service Commission of the State of New York (the "Commission") pursuant to the Public Service Law.

Appendix—Petition.

2. On December 19, 1975, Niagara Mohawk initiated rate proceedings (Cases 26943, 26944, 26945) before the Commission which, after numerous days of hearings throughout 1976 and briefing in mid-1976, culminated in a Commission Opinion and Order dated November 16, 1976, allowing the Company to increase its electric rates by $52,890,000 and its gas rates by $10,798,000 (Opinion and Order annexed hereto as Exhibit A).

3. In that Opinion and Order, the Commission required the Company to treat as customer-contributed capital with a zero cost, approximately $12.4 million of income tax refunds which the Company received in 1974 and 1975 due to the retroactive adoption of minimum guideline lives for computing tax depreciation in the years 1966-1968 (Exhibit A, pp. 13-14).

4. By Order dated December 30, 1976 (Case 26943) the Commission directed the Company to treat $836,441 of real property tax refunds for the years 1971-1974 in the same manner as the income tax refunds (Order annexed hereto as Exhibit B).

5. By Order issued February 10, 1977, the Commission denied a petition for rehearing filed by the Consumer Protection Board (concerning, in part, the tax refund issue) and adhered to its decision on the treatment of the tax refunds as set forth in its Opinion and Order dated November 16, 1976 (Order annexed hereto as Exhibit C).

6. The combined effect of the Commission's treatment of the income tax refunds and real property tax refunds is to reduce the Company's rate base by more than $13 million and its annual revenue requirements by approximately $2.5 million.

7. The Commission Orders of November 16 and December 30, 1976 are arbitrary, unsupported by substantial evidence, confiscatory, and contrary to the legal principle that future rates may not be determined on the basis of alleged past excesses.

8. No previous application for the relief herein requested has been made to any court.

WHEREFORE, for the reasons set forth herein, the petitioner prays that the Court issue a judgment pursuant to Article 78 of the CPLR annulling the Commission's order of November 16, 1976 (Cases 26943, 26944, 26945) in the respect complained of and the order of December 30, 1976 (Case 26943) in its entirety and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York,
March 14, 1977.

LeBOEUF, LAMB, LEIBY
& MacRAE
140 Broadway
New York, New York 10005
(212) 269-1100

JOHN H. TERRY
Senior Vice President, General
Counsel and Secretary
Lauman Martin, Esq.
Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202
(315) 474-1511

Affidavit of Halcyon G. Skinner

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of
NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules
against

THE PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Respondent.

State of New York }
County of New York } ss.:

HALCYON G. SKINNER, being duly sworn deposes and says that:

1. I am a member of the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Niagara Mohawk Power Corporation ("Niagara Mohawk"), the movant herein, and submit this affidavit in support of the foregoing motion for leave to appeal to the Court of Appeals pursuant to § 5602 of the Civil Practice Law and Rules.

2. Niagara Mohawk is challenging New York Public Service Commission ("Commission") determinations made in the Company's last rate proceeding which treated $13.24 million of Federal income tax refunds and real property tax refunds received by the Company (and relating to prior years) as

customer-contributed capital, thereby excluding them from rate base and preventing the Company from earning a return thereon.

3. The unanimous confirmation of the Commission's determinations by the Appellate Division, Third Department on August 4, 1977 (annexed as Exhibit A) has precluded Niagara Mohawk from appealing as of right under CPLR 5601(a). Notice of Entry together with a copy of the Judgment of the Appellate Division dismissing the Petition (annexed as Exhibit B) was served by mail upon Niagara Mohawk on September 13, 1977.

4. A motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals was made by Niagara Mohawk on September 1, 1977 before and denied by the Third Department on October 14, 1977. Notice of Entry together with a copy of the Order of Denial (annexed as Exhibit C) was served by mail upon Niagara Mohawk on October 31, 1977.

5. The determinations of the Commission and the confirmation by the Third Department were contrary to law in the following respects:

(a) The determination that tax refunds received by the Company were customer-contributed capital was contrary to established precedent and unsupported by any evidence;

(b) The Third Department substituted its own rationale for that of the Commission after rejecting the sole rationale advanced by the Commission in support of its determinations;

(c) The determinations violated the well-established rule against retroactive ratemaking; and

(d) The determinations were made without the benefit of any evidence on the actual returns earned by the Company during the periods to which the refunds pertain.

6. To the best of my knowledge and belief, the questions raised based on the facts herein had not been passed upon by any court in this state prior to the determination of the Appellate Division, Third Department and have never before been passed upon by this Court. They are questions of substantial public importance that are likely to recur in the future.

7. The argument set forth herein are fully considered in the accompanying memorandum which I hereby request be incorporated by reference.

WHEREFORE, your deponent respectfully requests that this Court grant Niagara Mohawk's motion for leave to appeal.

HALCYON G. SKINNER.

Sworn to before me this 22nd day of November, 1977.

STUART LEBANSKY
Notary Public
State of New York
No. 4633871
Commission Expires March 30, 1978